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In the Supreme Court of the United States

October Term, 1952

No.

L. C. Parker, Petitioner

vs.

State of North Carolina, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, L. C. Parker, respectfully prays for a writ of certiorari to the Supreme Court of North Carolina to review the final judgment entered the 19th day of March, 1952, affirming the judgment of the Superior Court of Johnston County, State of North Carolina. R., 2nd Appeal, p. 17. The rules of the Supreme Court of North Carolina prohibit the filing of petitions to rehear in criminal cases. R., 2nd Appeal, p. 22; (Clerk's certificate) **State v. Council, 129** N. C. 511, 39 S. E. 814.

OPINION BELOW

No opinion was rendered by the Superior Court of Johnston County. The opinion of the

Supreme Court of North Carolina is contained in the Record, R., 2nd Appeal, p. 18, and is reported in 235 N. C. 302.

JURISDICTION

The jurisdiction of this Court is invoked under the Act of June 25, 1948, 28 U. S. C., Sec. 1257 (3).

SUMMARY STATEMENT

Petitioner was indicted in the Recorder's Court of Johnston County on the 20th day of January, 1951, for unlawful possession of non-taxpaid whiskey. R., 1st Appeal, pp. 8-9; R., 2nd Appeal, pp. 3-4. While said charge was pending for trial, petitioner was indicted in two bills, each containing two counts, returned by the grand jury at the February Term, 1951, of the Superior Court of Johnston County, charging that on the 20th day of January, 1951, the defendant unlawfully and wilfully (1) did combine, conspire, and confederate with one Elmo Allen to unlawfully possess intoxicating liquor upon which the taxes due the United States Government and the State of North Carolina had not been paid; (2) did have and possess ninety-six gallons of intoxicating liquor upon which the taxes due the State of North Carolina and the United States Government had not been paid; (3) did have and possess alcoholic liquors upon which the taxes due the United States Government and the State of North Carolina had not been paid for the purpose of sale; and (4) did at divers other times

prior thereto, transport upon a motor vehicle intoxicating liquors upon which taxes due the State of North Carolina and the United States Government had not been paid, to all of which the defendant pleaded not guilty. R., 1st Appeal, pp. 2-4; R., 2nd Appeal, pp. 5-7.

Upon the call of the case in the Superior Court on Friday, the 16th day of February, 1951, and before pleading, the defendant had moved for a continuance for the term upon the following grounds: (1) the bills of indictment having been returned on Wednesday, the 14th day of February, 1951, and the defendant having been arrested around 3 P. M. on the same day and kept in custody until court adjourned, he had not had sufficient time to prepare his defense; and (2) the solicitor for the State, in opposing defendant's motion for continuance, had made prejudicial statements in the presence of prospective jurors. These motions were denied, and defendant excepted. R., 1st Appeal, pp. 6-7. The defendant then moved to quash the bills of indictment insofar as the charge preferred against him in the Recorder's Court of Johnston County on the 20th day of January, 1951, as shown by warrant then issued out of said court, covered the charges in the Superior Court. In support thereof, the defendant offered in evidence the two bills of indictment on which the prosecution rested, as hereinabove described, and the warrant as issued by the Recorder's Court. The charge set forth in the Recorder's Court warrant was possession on the 20th day of January, 1951, of

"a complete distillery for the manufacture of whiskey and of 96 gallons of whiskey on which the tax imposed by the State of North Carolina and the tax imposed by the United States had not been paid." In addition thereto the defendant proposed to show by the sheriff the identity of the charges in the warrant and in the bills of indictment. R., 1st Appeal, pp. 7-10. Defendant had moved in the Recorder's Court for trial by jury prior to the indictments in the Superior Court. R., 1st Appeal, p. 10, Defendant was acquitted in the Superior Court of transporting and was convicted in the Superior Court of the charges of conspiracy, possession, and possession for the purpose of sale. R., 1st Appeal, p. 4; R., 2nd Appeal, p. 1. From judgment upon the verdict in the Superior Court, defendant appealed to the Supreme Court of North Carolina. R., 2nd Appeal, p. 2. The Supreme Court of North Carolina reversed the judgment as to the charge of conspiracy, sent the possession count to the Recorder's Court for trial, and sent the possession for the purpose of sale count back to the Superior Court for proper judgment. The opinion of the Supreme Court of North Carolina disposing of the first appeal is reported in 234 N. C. 236. The defendant was then acquitted of the charge of possession by verdict of the jury in the Recorder's Court. R., 2nd Appeal, pp. 4-5. Subsequently, when the case was called in the Superior Court for the purpose of judgment, and prior to the passing of judgment on the count of possession for the purpose of sale, the defendant made a motion

in arrest of judgment and interposed a plea of former jeopardy on the ground that he had been acquitted in the Recorder's Court of the charge of possession of the identical whiskey for which the Superior Court now proposed to sentence him on a count of possession for the purpose of sale, and offered evidence in support of his motion. R., 2nd Appeal, pp. 2-9. Defendant's motion was denied and plea overruled, and judgment was rendered imposing a twelve months' road sentence. R., 2nd Appeal, p. 14. Defendant appealed to the Supreme Court of North Carolina, and the opinion of said Supreme Court affirming said judgment and holding that defendant's plea of former jeopardy was properly overruled. R., 2nd Appeal, p. 18.

RAISING OF FEDERAL QUESTION

The federal question sought to be reviewed, to-wit, whether the petitioner was twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States was raised first when the defendant, prior to any plea in the Superior Court, moved to quash the indictments (plea in abatement) on the ground that the charge of possession for the purpose of sale was covered by the charge of possession, which latter charge was pending in the Recorder's Court. This motion was denied and made the subject of exception. R., 1st Appeal, pp. 7-10. The Supreme

Court of North Carolina held in its opinion on the first appeal, 234 N. C. 236, at 240, that the ruling of the Superior Court was properly questioned and sent the count of possession back to the Recorder's Court. After acquittal in the Recorder's Court, the defendant moved in the Superior Court, prior to the judgment and imposition of sentence, for arrest of judgment and interposed a plea of former jeopardy which was overruled by the Superior Court and judgment was rendered imposing sentence. R., 2nd Appeal, pp. 2-9, 14. The Supreme Court of North Carolina, in the opinion affirming the judgment of the Superior Court, ruled that the Superior Court properly overruled defendant's plea of former jeopardy, R., 2nd Appeal, p. 18, and in so ruling, could not have rendered judgment without deciding that the petitioner was not twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Was the petitioner twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. THE INSTANT CASE IS WITHIN THE STATUTORY PROVISION RELIED ON TO CONFER JURISDICTION ON THIS COURT.

Petitioner respectfully contends that the following authorities sustain his contention that this Court has jurisdiction of and should take cognizance of the instant case as being within the provisions of 28 U. S. C., Sec. 1257 (3):

Wilson v. Cook, 327 U. S. 474, 66S. Ct. 663, 90 L. Ed. 793, in which the Court said (66 S. Ct. 663, at 666): ". . . This jurisdictional requirement is satisfied only if the record shows that the question of validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state (citing authorities); or has in fact been decided by it (citing authorities), and that its decision was necessary to the judgment (citing authorities.")

Honeyman v. Hanan, 300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476, in which the Court said (57 S. Ct. 350, at 353): " . . . It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it (citing cases)."

See also: **Williams v. Kaiser,** 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; **Tilt v. Kelsey,** 207 U. S. 43, 28 S. Ct. 1, 52 L. Ed. 95; **Chambers v. Baltimore & Ohio R. R. Co.,** 207 U. S. 142, 28 S. Ct. 34, 52 L. Ed. 143.

This Court has taken cognizance of cases in which the contention was made that double jeopardy deprives a defendant of a right in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. **State of Louisiana v. Reswehr**, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422. See also dissenting opinion of Mr. Justice Harlan in **Hurtado v. People of the State of California**, 110 U. S. 547, 4 S. Ct. 111, 292, 28 L. Ed. 232.

In the instant case, it is respectfully contended that the decision as to whether the petitioner had been placed in double jeopardy in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States was necessary to the determination of the cause and that judgment as rendered by the Supreme Court of North Carolina could not have been given without deciding it.

2. THE DECISION HEREIN OPERATES SO AS TO PLACE PETITIONER IN DOUBLE JEOPARDY, THEREBY DEPRIVING HIM OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of North Caroline in the opinion disposing of the first appeal held that the Recorder's Court had jurisdiction of the charge of possession concurrent with the Su-

perior Court by virtue of the act of the General Assembly of North Carolina creating the Recorder's Court of Johnston County (See Appendix, p. a), and that the Recorder's Court having first taken cognizance of the charge, that court retained jurisdictoin to the exclusion of the Superior Court. **State v. Parker**, 234 N. C. 236, at 240-241. Petitioner was acquitted in the Recorder's Court of the charge of possession, and it is respectfully contended that if he did not have the whiskey in question in his possession, that he could not have had it in his possession for the purpose of sale, notwithstanding the fact that the two offenses are separate crimes under G. S. 18-48 and 18-50 of the General Statutes of North Carolina. See also G. S. 18-11 (Appendix, pp. a-b). Petitioner therefore respectfully contends that the refusal of the Supreme Court of North Carolina to vacate the judgment of the Superior Court overruling petitioner's motion that the judgment be arrested on the grounds of former acquittal and that sentence be not imposed on the grounds of former acquittal as to the count of possession for the purpose of sale, operates to place the petitioner in double jeopardy and to deprive him of his liberty without due process of law in violation of the Fourteenth Amendment.

The petitioner respectfully submits and recognizes that principle of law stated in **Reynolds v. U. S.**, 280 F.256 and 282 F.1 (C.C.A. Tenn., 1922), as follows: "The question of double punishment may not improperly be tested by

imagining the separate counts as separate indictments, separately tried. It would seem clear that had plaintiff in error first been tried and convicted upon the charge contained in the second count before us, that is to say, of having in her possession implements and supplies designed for the unlawful manufacture of intoxicating liquors such conviction would not have been a bar to a subsequent prosecution for the offense of unlawful manufacture of said liquor and because the evidence required for conviction upon the charges of possession of implements and materials designed for the manufacture would not be sufficient to convict of the charge of actual manufacture. That on the other hand had she been first convicted of the charge of actual manufacture of intoxicating liquors that such conviction would bar a prosecution under a later indictment for the offense of having in her possession implements and materials designed for such manufacture. That the evidence required for conviction of manufacture would be sufficient to convict of having in possession implements and materials therefore and for the same reason that such manufacture would be impossible without implements and materials for the purpose. That we do not understand it necessary to double punishment that each offense contain an element not found in the other. To our minds there is nothing illogical in the fact that the question of double punishment in the contingencies stated is made to depend upon the accidental order of prosecution." See also, **Albrecht v. U.S., 273**

U. S. 1; 74 A.L. R. 406; **Gray v. U. S.**, 14 F. (2nd) 366; **Gavieres v. U. S.**, 220 U. S. 338; 31 S. Ct. 421; **Morgan v. Devine**, 237 U. S. 632.

Furthermore, as stated in **People v. Cook**, 236 Mich. 333. 210 N. W. 296 (1926): "Where the defendant in response to a decoy telephone call for intoxicating liquors delivered it to a certain place, when he was placed under arrest, a conviction and sentence under a plea of guilty to the charge of possession was held a bar to another prosecution under the same statute for unlawfully transporting the same liquor. It would have been physically impossible to transport it without possessing it. While it is possible that one may possess intoxicating liquor without transporting it, it is manifest that it can not be transported without being possessed. If the respondent had first been charged with transporting and had been convicted it could not possibly be contended that he could be doubly punished for transporting, by afterwards charging him with possession, which was a necessary incident to transporting. Or supposing respondent had been acquitted on the first charge — that a jury had found he was not even possessed of the nine pints of whiskey in question — would he not again be put in jeopardy for the same offense, if tried for transporting the liquor he was found innocent of possessing, since transporting necessarlly involves possession?" See also, **Schoedder v. U. S.**, 7 F. (2nd) 60 (C. C. A., N. Y., 1925); **Kuck v. State**, 149 Ga. 191; **Com. v. Wilkerson**, 201 Ky. 729; **Coon v. State**, 97

Tex. Crim. Rep. 645; **Phillips v. State, 109** Tex. Crim. Rep. 23; **State v. Covington,** 142 Tenn. 659; 31 L. R. A. (N. S.) 725.

The petitioner argues and contends that even though the legislature of North Carolina has made violations of G. S. 18-48 and 18-50 of the General Statutes of North Carolina (Appendix p. a) the subjects of separate and distinct counts, that in law and in fact the petitioner was twice put in jeopardy when he was sentenced on the possession for the purpose of sale count, when he had been tried and acquitted on the same evidence on the possession count in the Recorder's Court, which said trail should have been had prior to indictment and trial in the Superior Court.

The petitioner further argues and contends that where the only act of possession is the possession necessarily involved in the for purpose of sale count or transporting count, and is the subject of another count, that the offense is single and that the imposing of sentences on a count for possession and also on a count for transporting or possession for the purpose of sale would be erroneous, and that a verdict of not guilty upon the count of possession acquits a defendant of the material element involved in the charge of possession for the purpose of sale.

As stated in 30 A. J. 472, Intoxicating Liquors, section 409: "Whether possession and transportation of liquor constitute a single or separate offense is a question upon which there is a conflict in the authorities. It has been sug-

gested that the true rule is that where the only possession is that necessary for and incidental to the transportation, there is one offense, and a conviction of either act precludes a subsequent conviction for committing the other . . . . . ". See also, **Colson v. U. S.**, 89 F. (2d) 124; **U. S. v. Holbrook**, 36 F. Supp. 345; **Ferroni v. U. S.**, 285 U. S. 935; **Corbett v. U. S.**, 89 F. (2d) 124; **Clawson v. Rives**, 104 F. (2d) 240; **U. S. v. Ball**, 16 S. Ct. 1192; **U. S. v. Clans**, 19 F. Supp. 435.

The petitioner respectfully contends that where a person has been tried and acquitted of a crime which has various incidents included in it, he can not be a second time tried or sentenced for one of those necessary incidents without being twice put in jeopardy for the same offense. That in order for an acquittal to be a bar to a subsequent indictment for the crime, it would seem to be essential that conviction including a necessary element in the second crime might have been had under indictment for the first crime, and that if a conviction might have been had and was not, there was an implied acquittal.

In the instant case, inasmuch as the same evidence was used to acquit in the Recorder's Court as was used to convict in the Superior Court, it is respectfully contended that here the two counts were in legal effect the same, since pursuant to G. S. 18-11 of the General Statutes of North Carolina (Appendix, p. b), it is permissible to convict or acquit on the same evidence in each instance. It is therefore re-

spectfully contended that a logical and sound administration of criminal justice requires application of the rule of double jeopardy in the instant case. See **Burton v. U. S.**, 202 U. S., 344.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to the Supreme Court of North Carolina, and that the judgment of the Supreme Court of North Carolina be reviewed and reversed.

Dated at Smithfield, N. Car.

June 9, 1952

Jane A. Parker
Attorney for Petitioner

E. Reamuel Temple
Of Counsel

APPENDIX of STATUTES

ACT OF GENERAL ASSEMBLY OF NORTH CAROLINA, PUBLIC-LOCAL LAWS 1911, Chapter 269, by which the Recorder's Court of Johnston County was created. "Section 6: Said court shall have all jurisdiction and power in all criminal cases arising in said county which are now or may hereafter be given to justices of the peace, and in addition to the jurisdiction conferred by this section, shall have concurrent original jurisdiction of all other criminal offenses committed in said county below the grade of felony, as now defined by law, and the same are hereby declared to be petty misdemeanors. . . ."

GENERAL STATUTES OF NORTH CAROLINA, SECTION 18-48:

NOT PAID; PUNISHMEN TAND FORFEIT-S 18-48. POSSESSION ILLEGAL IF TAXES NOT PAID; PUNISHMENNT AND FORFEITURE FOR VIOLATIONS; POSSESSIION IN CONTAINER WITHOUT PROPER STAMP, PRIMA FACIE EVIDENCE.— It shall be unlawful for any firm, person or corporation to have in his or its possession any alcoholic beverages as defined herein upon which the taxes imposed by the laws of congress of the United States or by the laws of this state, have not been paid and any per-

son convicted of the violation of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or any other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in S 18-6 for the seizure, arrest, confiscation and sale of such vehicle, vessel, aeroplane or other means of transportion shall be used and the provisions of said S 18-6 are hereby declared to be in full force and effect in any of the counties of the state which shall operate under the provisions of this article, and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the state of North Carolina shall constitute prima facie evidence of the violation of this section. (1937, c. 49, s. 13.)

GENERAL STATUTES OF NORTH CAROLINA, SECTION 18-50:

S 18-50. POSSESSION FOR SALE AND SALES OF ILLICIT LIQUORS: SALES OF LIQUORS PURCHASED FROM STORES.

The possession for sale, or sales, of illicit liquors, or the sale of any liquors purchased from the county stores, is hereby prohibited and a violation of this section shall constitute a crime and shall be punishable by fine or imprison-

ment, or both, in the discretion of the court. (1937, c. 49, s. 15.)

GENERAL STATUTES OF NORTH CAROLINA, SECTION 18-11:

S 18-11. POSSESSION PRIMA FACIE EVIDENCE OF KEEPING FOR SALE. — The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him threin. (1923, c. 1, s. 10; C. S. 3411 (j).)